

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 463/02 OF 2018

MEET SINGH BHACHU APPLICANT

VERSUS

GURMMIT SINGH BHACHURESPONDENT

(Application for extension of time to lodge an Appeal against the Judgment and Decree of the High Court of Tanzania at Arusha)

(Maghimbi,J.)

Dated the 01st day of March, 2016

in

Civil Case No. 9 of 2013

RULING

26th November & 13th December, 2019

KOROSSO, J.A.:

The application before is for extension of time to lodge an appeal against the Judgment and decree of the High Court of Tanzania (Maghimbi, J.) in Civil Case No. 9 of 2013 dated 01st March 2016 and is by way of notice of motion pursuant to Rules 10 and 48(1)(2) of the Tanzania Court of Appeal Rules, 2009 as amended (The Rules) with a supporting affidavit sworn by Mr. Alute Simon Lesso Mughwai, Advocate duly instructed by the applicant. There are also prayers that costs and incidentals to the application abide the result of the intended appeal.

The application is predicated on the following grounds expounded in the notice of motion:

(a) . That the delay in appealing was caused by protracted proceedings in the High Court of Tanzania for an Order for leave to appeal to the Honourable Court, indisposition and waiting to be supplied with the requisite copies of proceedings,

(b) . That, important points of law and fact are involved in the decision and decree intended to be appealed against that require due consideration and determination by the honourable Court of Appeal.

On the part of the respondent, he resisted the application through his filed affidavit in reply affirmed by Gurmit Singh Bachu, the respondent himself. At paragraph 3, he avers that the application is improperly before the Court and should be dismissed with costs.

Before proceeding any further, we find it pertinent albeit briefly, to provide the background of the matter. It emanates from a Probate and Administration Cause No. 5 of 2009 where the applicant petitioned to be

appointed the administrator of the estate of their deceased father, Gurbax Singh Arjan Ram, while the respondent was a caveator. Therefrom, a civil suit, Civil Case No. 9 of 2013 arose from the said probate case, and the applicant was the plaintiff and the respondent was the defendant. The High Court entered judgment on the 01st March, 2016 and it is contended that the will of the deceased was nullified and the Administrator General was appointed to administer the deceased's estate instead of the applicant or respondent. Dissatisfied by the High Court decision, a notice of appeal and a request to be provided with necessary documents to proceed with an appeal were filed by the applicant through his advocates. On the 18th September 2016, the applicant's advocate then, Mr. Meinrad M. Desouza withdrew his services alleging lack of instructions, and it is then that the current counsel for the applicant was engaged.

When the application came for hearing, Mr. Alute Mughwai, learned Advocate entered appearance for the applicant while Mr. Bharat Chadha, learned Advocate represented the respondent.

At the outset, the Court invited parties to address it on a preliminary issue raised in the affidavit in reply there being no notice of preliminary

objection filed. The concern raised was whether the application was competent having been filed in this Court without being filed first at the High Court.

The applicant counsel started by addressing the raised concern stating that the assertion that the current application was incompetent is devoid of merit, arguing that the High Court has no jurisdiction to entertain application on extension of time to the Court of Appeal. He argued that the jurisdiction of the High Court to entertain extension of time is governed by section 11(1) of the Appellate Jurisdiction Act, Cap 141 of the Laws (the AJA) and that under the said provision the High Court has jurisdiction to extend time only on three instances as outlined there. That, in only those where an application is refused by the High Court under those three scenarios that the applicant may then apply to the Court of Appeal as a second bite under Rule 45 of GN 362 of 2017.

The counsel contended further that there is nowhere where it is provided that the High Court has jurisdiction to entertain an application to extend time to lodge an appeal to this Court. That such an application can only be made under Rule 10 of the Rules as observed in **William Shija vs**

Fortunatus Masha [1997] TLR 213 at page 218, where in discussing an application for extension of time to appeal to the Court of Appeal, the Court held, that it was not proper to file such an application in the High Court and that an application of such a nature is filed in the Court of Appeal. The other case cited by the learned counsel to buttress his stance is **Maneno Mengi Limited and Three others vs Farida Saidi Nyamachumbe and the Registrar of Companies** [2004]TLR 391 at page 396, where the Court held that it is the Court which has the power to extend time in which to institute the appeal.

The counsel for the applicant contended further the proposition that the High Court and the Court of Appeal have concurrent jurisdiction to entertain an application for extension of time to appeal to this Court is erroneous since they do not, it is the Court of Appeal with exclusive jurisdiction in terms of Rule 10 of the Rules. He thus prayed the Court to find that the concern raised has no merit and the current application is properly before the Court.

The respondent's counsel disagreed with the stated position, arguing that the present application is incompetent for offending the provision of

Rule 47 of the Rules as amended by GN 362 of 2017, which clearly states that where there is an application the same shall in the first instance be filed in the High Court. That in **William Shija vs Fortunatus Masha** (supra), the Court holding as found at page 217 has not been stated by the learned counsel for the applicant arguing that his submissions shows he has misconstrued the said holding. The counsel made reference to the case of **Thomas David Kilumbuyo and Anor vs Tanzania Telecommunications Co. Ltd**, Civil Application No. 1 of 2006 (unreported), arguing that although in this application what was addressed was leave to appeal out of time, the decision discusses matters related to extension of time to appeal as guided by Rule 10 of the Rules. He thus contended that the power to file extension of time to file notice of appeal includes power to file application for extension of time to file an appeal like the present application. He thus argued that because the applicant did not file his application in the High Court first, this application is incompetent and should be struck out.

Having considered the rival submissions by the counsel for both sides and also considered the cases cited to support each side, this matter need not take much of our time. I find it is pertinent to reproduce the provisions

which address this issue. Section 5 of the AJA addresses appeals to the Court of Appeal. Section 11 of AJA outlines matters related to extension of time by the High Court and subsection (1) of Section 11 states:

*"Subject to subsection (2), the High Court or, where an appeal lies from subordinated court exercising extended powers, the subordinate court concerned, may extend time for **giving notice of intention to appeal from a judgment** of the High Court or of the subordinate court concerned, for **making an application for leave to appeal** or **for a certificate that the case is a fit case for appeal**, notwithstanding that the time for giving the notice or making the application has already expired".*

(Emphasis is mine)

The above provision unveil circumstances where the High Court may extend time from a judgment of the High Court. This when read together with Rule 45A(1) and 47 of the Rules which states:

45A(1) "Where an application for extension of time to:-

(a) lodge a notice of appeal;

(b) apply for leave to appeal; or

(c) apply for certificate on the point of law, is refused by the High Court, the applicant may within fourteen days of such decision apply to the Court for extension of time”.

The said provision clearly outlines application for extension of time which the High Court may deal with in line with Rule 47 of the Rules. Rule 47 of the Rules states:

47 “Whenever application is made either to the Court or the High Court, it shall in the first instance be made to the High Court or tribunal as the case may be, but in criminal matter the Court may in its discretion, on application or of its own motion give leave to appeal or extend time for doing of any act, notwithstanding the fact that no application has been made to the High Court”.

The Court has dealt with this issue before, including in the case cited by both counsel, that is, **William Shija vs Fortunatus Masha** [1997] TLR 213. In this case the court the Court stated that, filing an application

for extension of time to appeal to this Court in the High Court was a wrong application and observed thus:

"it is common ground that an application of that nature is filed in this Court. The appropriate application envisaged to be filed in the High Court was an application for extension of time in which to file notice of appeal. Once that application is granted in the High Court, then the application for extension of time to appeal before a single justice would be filed."

Another case is **Maneno Mengi Limited and Three Others vs Farida Said Nyamachumbe and the Registrar of Companies**, Civil Appeal No. 45 of 2003, and it was observed:

"It is the Court which has the power to extend time in which to institute the appeal"

I have also considered what was stated in the case cited by the respondent's counsel, **Thomas David Kirumbuyo and Abbas S. Mhanga vs Telecommunications Co. Ltd**, Civil Application No. 1 of 2005 (unreported) decided by a single Justice of the Court of Appeal,

stating that, an application for extension of time to appeal to the Court has to start at the High Court. Despite this, I find this case is distinguishable in that the matter considered and determined was an application for extension of time for leave to appeal to the Court of Appeal, and not an application for extension of time to appeal to the Court of Appeal.

We find it pertinent to be guided by a more recent decision of this Court, although also by single justice of the Court of Appeal (Massati, J.A.), in **Henry Muyaga vs Tanzania Telecommunication Company Ltd**, Civil Application No. 8 of 2011. In this case, the Honourable Justice of Appeal had time to consider this issue on whether it was proper for this Court to deal with an application for filing an appeal which the High Court did not deal with first, and he stated that:

*“Under section 11 of the Appellate Jurisdiction Act, (Cap 141 R.E. 2002) and Rule 45 of the Court of Appeal Rules 2009, both this Court and the High Court have concurrent jurisdiction respectively to extend time to file a notice of appeal or an application for leave to appeal. **But only this Court has jurisdiction to determine applications for***

*extension of time in which to file appeals. The present application is "for extension of time to file an appeal" The presumption is that there is already a notice of appeal. **So this Court has exclusive jurisdiction to determine this type of application.** But if there is no notice of appeal, such an application should first be placed before the High Court". [Emphasis mine]*

Thus from the above holding, I so find that it is only applications for extension of time outlined by the law as shown hereinabove, which should be applied in the High Court in the first instance, but the jurisdiction to determine an application for extension of time to appeal is in the Court. This being the position, I agree with the learned counsel for the applicant contention that the raised concern that the applicant should have in the first instance applied for extension of time to file an appeal in the High Court and not in this Court is misconceived.

We now move to the merit of the application before me, that is, determination of the application for extension of time to appeal and both oral submissions and the written submissions filed shall be considered. Mr.

Mughwai commenced by explaining what gave rise to this application. Submitting that the issue for consideration in this application is whether or not the applicant has shown good or sufficient cause to warrant time to be extended for him to lodge and appeal to the Court against the judgment and decree of the High Court in Civil Case No. 9 of 2013 within the confines of Rule 10 of the Rules. What amounts to good cause he contended is within the discretion of the Court having regard to particular circumstances of each case. That also the applicant must account for all the days of the delay to file the appeal.

The applicant's counsel conceded that by virtue of Rule 90(1) of the Court of Appeal Rules, 2009 after lodging the Notice of Appeal on 16th March 2016, the applicant failed to appeal in the appropriate registry within sixty days, hence the current application. In addressing the delay to file the appeal on time, the learned counsel submitted that it was caused by various factors. One, is that, the time waiting to be supplied with the requisite copies of proceedings caused the delay. Arguing that the Notice of Appeal was filed timely and the letter seeking copies of the Judgment, decree and proceedings were filed within time. That despite consistent follow-ups to be supplied with the records and judgment, it was until the

24th August, 2016 when he was informed that the records requested were ready for collection. These records had clerical errors and the Deputy Registrar was informed and requested to rectify discerned errors and the corrected documents were ready for collection on the 18th September, 2016 a date which should be deemed the applicant collected the requested documents. According to the applicant's counsel, the applicant could not have instituted the appeal before being supplied with the requisite copies of the judgment, decree and proceedings, this position fortified by what was stated in **Benedict Mumello vs Bank of Tanzania**, Civil Appeal No. 12 of 2002 (unreported).

The second reason advanced for the delay, is indisposition of the applicant between 26th September, 2016 and the 31st October, 2016 which prevented him from engaging a new counsel to process his intended appeal after his previous advocate had left. The case of **Tusekile Duncan vs Republic**, Criminal Appeal No. 202 of 2009 (unreported) was cited to cement this argument. Where illness was found to be good cause for extension of time to file notice of appeal.

The third cause of delay was protracted proceedings, that the applicant had instituted various applications in the process of searching for justice. There was Misc. Civil Application No. 216 of 2016 and Misc. Civil Application No. 111 of 2017 which the counsel conceded were infructuous and did not produce any positive results but the applicant had spent the period from 28th October, 2016 (when advocates were engaged) to the 18th April, 2018 prosecuting the said proceedings.

The counsel for the applicant also submitted that in case the reasons for delay and accounting for delay do not lead the Court to find good cause has been established, the Court should then also consider points of law pertinent for consideration in the intended appeal. Arguing that there are illegalities in the impugned decision and proceedings and the Court should find them to be sufficient cause to grant the application, citing **The Principal Secretary, Ministry of Defence and National Service vs Devram Valambhia** [1992] TLR 185 at pg. 188 (E-H) and **Esrom Magesa Maryogo vs Kassim Mohamed Said and Another**, Civil Application No. 227 of 2015, (unreported) as reference on this concern.

Mr. Mughwai argued that most of illegalities alleged are contained in the intended memorandum of Appeal annexed to the affidavit in support of the Notice of Motion in grounds No. 4 and 6. He further challenged the assertion by the respondent counsel that the memorandum of appeal was irrelevant in the present matter, saying it is in order and should be considered and would also assist the Court to determine whether the intended appeal is arguable. One of the issue, the applicant expounded as a point of law worthy to be considered by this Court, is whether it was proper for the High Court to determine *suo motu* without hearing the parties, the issue on whether or not leave to appeal to the Court of Appeal against the decision of the High Court arising from a Probate and Administration proceedings is a legal requirement. The counsel argued the Court to find that the applicant did not stay idle and has accounted for the period of delay and grant the application.

For the respondent, the counsel first adopted the respondent written submissions and affidavit in reply and contended that the applicant has not provided good reasons for the grant of the application. That the applicant remained idle throughout and that they have conceded on this and that the application is misconceived because based on factual consideration. That

the applicant filed the first application after 85 days of filing notice of appeal and the second application was filed after 104 days, days which have not been explained. That the present application has been filed after 85 days when the previous was dismissed.

The other concern raised was the fact that the applicant filed unnecessary applications and cited the case of **James Z. Chanila vs Ramadhani Mtundu**, Civil Application No. 10 of 2016 (unreported) to cement this point that, it is a case where the Court rejected similar arguments and it should be found that the applicant wasted time, and the protracted litigation should be held against the applicant and not be used to account for delays. The respondent counsel also implored the Court not to consider the memorandum of appeal at this stage citing the case of **Ngao Godwin Lasero vs Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported)

With regard to to alleged illegalities, he stated that the Court should not consider this because claimed illegalities are expected to be clearly visible and must be of sufficient importance and apparent on the face of the record. That what has been expounded in the memorandum of appeal

fails to satisfy the requirements of the law since illegality claims must be on the face of the record. The counsel contended further that yet again, the applicant has not shown these illegalities in the notice of motion and thus he cannot cover his negligence in pursuing the appeal under pretext that the intended appeal is important so as to address certain points of law and this point is a new one and was not canvassed previously. He also challenged submissions which were not canvassed before in the High Court. He stated that the requisite proceedings were ready by 16th September.

The respondent counsel also submitted that the applicant counsel failed to give any sufficient cause for the delay and what has been revealed is just negligence on his part. He also contended that the cited cases by the applicant's side are irrelevant to the application since delay has not been explained and that the affidavit does not amplify what is stated in the notice of motion. That the applicant failed to substantiate the requirement of Rule 10 of the Rules and thus the application should be dismissed with costs.

The rejoinder by the applicant's counsel was to deny conceding that the applicant has been idle and that what he had stated was that if the Court does not find merit in the grounds advanced then consideration should be on issues raised on illegalities and this did not mean they have abandoned the factual grounds. He then reiterated what was stated in the submission in chief and conceded that it is true that illegalities have to be apparent and that he has shown that these illegalities, since they have been pronounced in the intended Memorandum of Appeal which they have invited the Court to consider. He also denied submitting on a new ground and disputed arguments that the notice of motion is vague stating they could not put everything there, he thus reiterated the prayers sought.

I have dispassionately considered the notice of motion, affidavit supporting notice of motion and annexures thereto, the affidavit in reply, written submission from both sides and also the cited cases. It is important from the outset to state that the powers of extension of time under Rule 10 of the Rules are discretionary. Under this Rule, in considering an application for extension of time the applicant must show good cause for delay and courts may take into consideration such factors as; the length of delay, reasons for delay; the chance of success of the intended appeal; and

the degree of prejudice that the respondent may suffer if the application is granted. The cases of **Tanzania Revenue Authority vs Tango Transport Co. Ltd, Tango Transport Co. Ltd**, Consolidated Civil Applications No. 4 of 2009 and 9 of 2008 and **Mary Mchome Mbwambo and Another vs Mbeya Cement Company Limited**, Civil Application No. 271/10 of 2016 (both unreported) are relevant.

The issue before me is whether in the present application the applicant has shown good cause for extension of time in which to file an appeal. In this application one ground which the applicant has advanced as a reason for delay is protracted proceedings, which has been vehemently challenged by the respondent's counsel finding this only showed negligence on the part of the applicant. The decision to be challenged was delivered on the 1st March, 2016 in Civil Case No. 9 of 2013. The applicant lodged notice of appeal and a letter seeking to be supplied with copies of Judgment, decree and proceedings on 16th March, 2016 and both were served on the respondents on 29th March, 2016. There is evidence that follow-up letters were written regarding the requested documents and were collected on 24th August, 2016 and their being clerical defects therein,

applicant requested for corrections and the corrected versions were supplied on the 16th September, 2016.

The applicant avers in his affidavit supporting notice of motion annexed to the applicant's affidavit as MT-6 that his previous counsel withdrew his services on the 18th September 2016 and that between 26th September 2016 and 31st October, 2016 he was indisposed and then engaged the current advocate on 28th October, 2016. The recruited advocate undertook to file an application to seek leave to appeal and filed for extension of time in Misc. Civil Application No. 216 of 2016 filed on 7th November 2016 (9 days after counsel was instructed). The application was struck out on 19th June, 2017 and the respective Advocate upon being instructed to appeal, filed a notice of appeal application for extension of time to apply for leave to appeal to this Court was filed. That Misc. Civil Application No. 111 of 2017 was dismissed on 23rd Mach 2018. The current application was filed on 18th of June 2018 after receipt of the last Order in Misc. Civil Application No. 111 of 2017.

From the annexures to the affidavit supporting the notice of motion, proceedings and the Order dismissing Misc. Civil Application No. 111 of

2017 were received on the 18th April, 2018. Thus even if I was to consider all the actions taken by the applicant, including the period it is alleged he was indisposed, there is no explanation in the affidavit or notice of motion on the days between 18th April, 2018 to 18th June 2018 when the current application was filed.

The requirement of accounting for every day of delay has been emphasized by the Court in numerous decisions, such cases include **Bushiri Hassan vs Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007 (unreported) and **Karibu Textile Mills vs Commissioner General (TRA)**, Civil Application No. 192/20 of 2016 (unreported). In **Bushiri Hassan case**, the Court stated:

"Delay, of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken."

In failing to account for the days alluded to above, there is nothing else do to but to find that the applicant has failed to account for such time and in essence has not accounted for each day of the delay as required.

The applicants have also alleged there being illegalities in the impugned decision and proceedings of the High Court. Where there are allegations of illegality or irregularity when determining whether or not to extend time is well settled. Suffice to say, where extension of time was granted, the alleged illegalities were explained and shown. For instance, in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1999] TLR 182, the illegality alleged related to the applicant being denied an opportunity to be heard contrary to the rules of natural justice and thus it was clear.

In the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, the Court observed:-

"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA'S case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must

be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."

Thus the issue for me to determine is whether the point of law related to alleged illegalities raised, is of sufficient importance and also whether it is apparent on the face of record. The respondent counsel challenged the appellant's counsel assertion on illegality stating that it is not clear in the affidavit or notice of motion and therefore an afterthought. The applicant's counsel invited me to decipher the said points of law from the intended memorandum of appeal which is annexed to the affidavit supporting the notice of motion.

It is also important to note further that in the notice of motion, in terms of grounds that predicate the application, ground "b" states that, points of law and facts are involved in the decision and decree intended to be appealed against and that requires consideration and determination by the Court of Appeal. Also when you look at paragraph 6 of the supporting affidavit, it addresses the fact that the Hon. High Court Judge nullified the

Will of the deceased and appointed the Administrator General to administer the deceased estate. One of the legal points raised by the learned counsel for the applicant is whether the said finding complied with respective legal requirements. There is also paragraph 12 of the notice of motion, that claims there was a finding on the issue of whether or not leave to appeal was a legal requirement alleged to be an issue determined by the High Court judge without involving the parties. Thus without scrutinizing the intended memorandum of appeal, I find that these are point of laws which are apparent and need the attention of the Court of Appeal.

Therefore, this being the case, I find that the perceived irregularities apparent in the decision of the High Court amount to good cause, within the boundaries of what was held in **Jehangir Aziz Abdulrasul vs. Baloz Ibrahim Abubakar and Another**, Civil Application No. 79 of 2016 (Unreported), which stated:

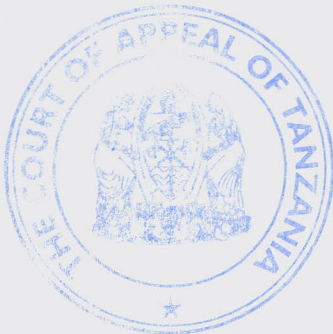
"the Court has a duty even if it means extending the time for the purpose of ascertaining the point and to take appropriate measures".


Accordingly, I grant the application for extension of time and order that the intended appeal be filed within sixty (60) days of this Ruling. Costs to abide by the results. Order Accordingly.

DATED at **ARUSHA** this 12th day of December, 2019

W. B. KOROSSO
JUSTICE OF APPEAL

The Ruling delivered this 13th day of December, 2019 in the presence of Mr. Alute S.L. Mughwai, counsel for the applicant and Mr. Bharat B. Chadha, learned counsel for respondent, is hereby certified as a true copy of the original.




G. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL